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 Clark County, Lynn Marie Goya
 and Steve Wolfson (in their official
 capacities)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * *

UNIVERSAL LIFE CHURCH MONASTERY
 a/k/a UNIVERSAL LIFE CHURCH,

Plaintiff,

vs.

CLARK COUNTY, NEVADA; LYNN MARIE
 GOYA (in her official capacity as Clark County
 Clerk); STEVE WOLFSON (in his official
 capacity as the Clark County District Attorney);
 JANE DOE; JOHN ROE; and JANE POE,

Defendants.

CASE NO. 2:18-cv-02099-RFB-BNW

OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

COME NOW, Defendants CLARK COUNTY, LYNN MARIE GOYA ("Clerk Goya")
 and STEVE WOLFSON (in their official capacities) (hereinafter "Clark County Defendants"), by
 and through their counsel of record, THOMAS D. DILLARD, JR., ESQ. of the law firm of
 OLSON CANNON GORMLEY & STOBERSKI, and hereby oppose Plaintiff's document styled
 as "Plaintiff Universal Life Church Monastery's Motion for Sanctions Against Defendants"
 [#55].

This Opposition is made and based upon all the pleadings and papers on file herein, the
 attached points and authorities, together with any argument that may be introduced at the time of
 hearing this matter before this Honorable Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Rule 11 motion for sanctions is in and of itself fatuous—if not frivolous—and an ill-advised attempt to bolster resistance to Plaintiff's opposition to the motion to strike Plaintiff's legal expert witness. Even before the motion to strike Plaintiff's expert was filed, Plaintiff was intending all along to engage in hard-ball litigation tactics to try to place pressure upon the Clark County Defendants to shrink from seeking judicial intervention regarding the propriety of Plaintiff's expert's opinions and legal methodology. The sequence of events and the content of Plaintiff's initial response makes apparent that Plaintiff had already prepared the correspondence raising the specter of Rule 11 before reviewing the motion itself. (Declaration of Thomas D. Dillard, Jr., attached as Exhibit "A"). Plaintiff had no substantive response to the case law provided to them in preview of filing the motion, but heap together some trivial timeliness and porous procedural arguments that fell well short of the Rule 11 mark. While engaging in tit-for-tat is not something desired here, it is submitted that Plaintiff is the one peering over the Rule 11 ledge when making the argument that the challenge to its expert is a frivolous motion and/or filed for an improper purpose. The Clark County Defendants further submit that the Court should deny Plaintiff's specious motion for sanctions. If there is any conduct worthy of Rule 11 condemnation, it has been done now by Plaintiff by multiplying the proceedings pertaining to the admissibility of expert opinions by filing a separate motion to strike the initiating motion and then followed by a specious Rule 11 motion. In addition, while the Clark County Defendants afforded Plaintiff additional time to oppose the initial motion to strike expert testimony, their opportunity to respond has been shrunk with respect to responding to Plaintiff's pile-on motion practice.

Plaintiff begins in their motion by arguing that the meet and confer conversation run afoul of the extraordinarily liberal Rule 11 standard because there was not protracted rumination about reaching some unobtainable middle ground regarding striking Plaintiff's expert. As is plainly evidence, the Clark County Defendants' position is that Plaintiff has disclosed a purported expert that will testify as to legal opinions relative to the First Amendment and his legal approach to

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1 doing so is entirely inconsistent with controlling law. There was really nothing more to discuss
 2 after defense counsel gave notice of the position and the general legal argument before requesting
 3 the Court to undertake its Rule 702 gatekeeping function regarding expert testimony.

4 Plaintiff's motion is devoid of any case law for their claim of having insufficient time to
 5 argue the issue before the motion was filed or any other legal authority. Their motion is instead
 6 based upon speculative assertions regarding counsel's subjective intent. Moreover, the motion
 7 smacks of hypocrisy as the substance of the conversation between counsel on this issue is no
 8 different than the discussions initiated by Plaintiff's counsel prior to filing their motion to strike
 9 and their motion for sanctions. (Exhibit "A"). Plaintiff has not raised any argument that even
 10 arguably supports its claim that the positions asserted in the motion to strike the expert are
 11 legally frivolous or the product of bad faith. The motion for sanctions is thus unworthy of any
 12 credence.

13 **II. LEGAL STANDARD FOR RULE 11 SANCTIONS**

14 Sanctions under Federal Rule of Civil Procedure 11 are warranted only when a party files
 15 a lawsuit or motion that is frivolous, legally unreasonable, without factual foundation, or is
 16 otherwise brought for an improper purpose. Warren v. Guelker, 29 F.3d 1386, 1388 (9th Cir.
 17 1994) (citing Conn v. Borjorquez, 967 F.2d 1418, 1420 (9th Cir. 1992); Operating Engineers
 18 Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988)). An "improper purpose" is a purpose to
 19 "harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed.R.Civ.P.
 20 11(b)(1). A filing is "frivolous" when it is "both baseless and made without a reasonable and
 21 competent inquiry." Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir.
 22 1990). "If, judged by an objective standard, a reasonable basis for the position exists in both law
 23 and in fact at the time the position is adopted, then sanctions should not be imposed." Golden
 24 Eagle Dist. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir.1986).

25 The Ninth Circuit has warned: "Rule 11 is an extraordinary remedy, one to be exercised
 26 with extreme caution." See Operating Engineers, 859 F.2d at 1345. The Advisory Notes to the
 27 1993 amendments made clear that Rule 11 should not be used "to test the legal sufficiency of
 28 efficacy of the allegations in the pleading," nor to "intimidate an adversary into withdrawing

contentions that are fairly debatable.” Fed.R.Civ.P. 11; see Watson v. Poore, 2006 WL 2349968 (S.D. Ill. 2006)); Avent v. S.T.S., Inc., 2002 WL 1482546 (W.D. Tenn. 2002); Sears, Roebuck & Company v. Sears Realty Co., Inc., 932 F. Supp. 392 (N.D. N.Y. 1996). A Rule 11 motion is also not a means to emphasize or educate with respect to the merits of one's position. McMahan Securities Company v. F. B. Foods, Inc., 2006 WL 2092643 (M.D. Fla. 2006). It is thus altogether improper to use Rule 11 to advance or amplify a legal position. On Time Aviation v. Bombardier Capital Inc., 570 F.Supp.2d 328, 331 (D. Conn. 2008). Federal courts have accordingly *sua sponte* imposed sanctions on parties for seeking Rule 11 sanctions for improper purposes. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 485 (3d Cir. 1987); see also Wartsila NSD N. Am., Inc. v. Hill Int’l, Inc., 315 F.Supp.2d 623, 630 (D.N.J. 2004)(granting fees to the plaintiff where defendant chose to contest the sufficiency of the complaint via a Rule 11 motion instead of a motion to dismiss).

III. PLAINTIFF HAS NOT ESTABLISHED ANY BASIS FOR SANCTIONS

A. Plaintiff’s Arguments that the Motion to Strike the Expert was Stale when it was Filed Before the Setting of a Trial Date and the Expert Should Have Been Deposed Before Subject to Challenge are Clearly Unsound.

Plaintiff’s first argument suggests that the Clark County Defendants were obliged to raise their objections with Plaintiff’s expert during discovery. Plaintiff cites no support for this argument. The Federal Rule of Civil Procedure and the U.S. District Court of Nevada Local Rules make clear that the motion to strike the expert was timely filed and there is absolutely no requirement to make any formal objection during discovery to enable Plaintiff to cure the objections.

As set forth in the opposition to Plaintiff’s motion to strike, Local Rule 16-3(a) holds that, unless court ordered otherwise, “motions in limine must be filed 30 days before trial.” The motion to strike the expert (as it seeks to exclude expert testimony and historically requires inclusion of a meet and confer certification) is tantamount to a motion in limine. This court has treated those motions the same and have required the parties to meet and confer before settling evidentiary issues in motion practice. In this instance, the motions for summary judgment were

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1 just filed and there has been no hearing set regarding them. As a consequence, the parties have
 2 also yet to file a Joint Pretrial Order; therefore, the District Court has not set a trial date in the
 3 case pursuant to LR 16-4(X). The deadline to file motions in limine (or motions to strike experts)
 4 has thus not even been set yet by the District Court and yet Plaintiff still claims (without any
 5 legal support) that the motion raising expert objections was so untimely that it should be denied
 6 and it is also sanctionable. The timing of the motion to strike while dispositive motions are
 7 pending is in no wise tardy or improper. There is also no rule requiring a formal objection to be
 8 filed regarding expert testimony during the discovery period.

9 Second, the Clark County Defendants absolutely had no legal obligation to also pay
 10 Plaintiff's legal expert to give a deposition during the discovery phase of the case. The purpose
 11 of the Rule 26 specific disclosure requirements to indicate all data evaluated, the expert's
 12 methodology and all the expert's opinions was imposed in part to eliminate the expenditure of
 13 expensive expert deposition costs, if possible. Pursuant to Fed. R. Civ. P. 26(a)(2)(B), the expert
 14 disclosure must include a written report providing: (1) a complete statement of all opinions the
 15 witness will express and the basis and reasons for them; (2) the facts or data considered by the
 16 witness in forming them; (3) any exhibits that will be used to summarize or support them; (4) the
 17 witness' qualifications, including a list of all publications authored in the previous 10 years; (5) a
 18 list of all other cases in which, during the previous 4 years, the witness testified as an expert at
 19 trial or by deposition; and (6) a statement of the compensation to be paid for the study and
 20 testimony in the case. In addition, Federal Rule of Civil Procedure 26(a)(4)(A) states that "**the**
 21 **deposition (of the expert) may be conducted only after the report is provided.**" (Emphasis
 22 added).¹ Rule 26 contemplates that an expert report be so detailed that "in many cases the report
 23

24 ¹ There is ample federal authority for the proposition that expert disclosures must be complete
 25 and timely so that opposing counsel is not forced to depose an expert in order to avoid an
 26 ambush at trial, and so as to shorten or decrease the need for expert depositions and conserve
 27 resources. See Ortiz-López v. Sociedad Española de Auxilio Mutuo y Beneficiencia, 248 F.3d
 28 29, 35 (1st Cir. 2001) (examining topic); R.C. Olmstead, Inc. v. CU Interface, LLC, 606 F.3d
 262, 271 (6th Cir. 2010) (similar); Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277,
 284 (8th Cir.), cert. denied 516 U.S. 822, 116 S.Ct. 84 (1995)(same). The report is deemed
 adequate when it is sufficiently detailed in a manner that eliminates surprise and unnecessary
 depositions with the attendant reduction in cost. See Reed v. Binder, 165 F.R.D. 424, 429

1 may eliminate the need for a deposition.” See Rule 26 committee note. Plaintiff has simply no
 2 colorable basis to complain that its expert was not deposed about the legal conclusions in his
 3 report. Plaintiff’s position that the failure to depose the expert somehow operated as a waiver of
 4 objections is itself frivolous.

5 **B. Plaintiff’s Argument that the Meet and Confer was Not Robust or Long**
 6 **Enough or to Count and is Consequently Sanctionable is Utterly Groundless.**

7 Contrary to Plaintiff’s suggestion otherwise, defense counsel told them in writing days in
 8 advance of the telephone conference that he needed to hold a “meet and confer” regarding
 9 Plaintiff’s expert disclosures. (Exhibit “A”). During the conference, counsel advised Plaintiff that
 10 it was the defense position that the expert disclosure was entirely inadmissible and provided
 11 counsel caselaw citations supporting all of their arguments as a courtesy. Also, as a courtesy
 12 counsel indicated Plaintiff could have additional time to oppose for the asking. Id. Counsel was
 13 under no illusions that Plaintiff and its counsel would concede that the expert was not helpful to
 14 the trier of fact thus resulting in a waste of all the resources spent to compensate an attorney
 15 expert for his report and they would have no expert at trial. There is certainly much at stake with
 16 motions to strike expert; however, the Supreme Court is clear that the trial court must scrutinize
 17 expert testimony because of its potential powerful effect on a jury as part of its gatekeeper
 18 function. These are not disputes that rarely lend themselves to middle ground compromise like a
 19 documentary evidence dispute. Plaintiff’s counsel of course understands this. It speaks volumes
 20 that they then had no substantive response to the case law provided them beyond their naked
 21 assertion that it did not support striking the expert. Despite being told that it was the defense
 22 position that the expert was altogether improper, Plaintiff offered as a ruse to discuss more
 23 specific parts of the expert report. They purposefully tried to change the argument so that they
 24

25 _____
 26 (D.N.J. 1996)(so noting). One of the primary purposes of requiring experts to disclose their
 27 methodology and opinions in a report is to avoid the expert deposition altogether. See Elgas v.
 28 Colorado Belle Corp., 179 F.R.D. 296, 299 (D. Nev. 1998); see also Acosta v. Electrolux North
America, No. 08–60213–CIV, 2008 WL 5246160, at *5 (S.D. Fla. Dec. 16, 2008) (“[A]n expert
 report must be complete such that opposing counsel is not forced to depose an expert in order to
 avoid ambush at trial[.]” (internal quotation marks and brackets omitted)).

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1 could make this argument now.

2 The Clark County Defendants simply urge the Court to review the attached declaration of
 3 counsel which includes the written correspondence between the parties and that Plaintiff has
 4 already raised the issue of sanctions before the motion was filed and thus before they had any
 5 basis to argue that they were not given enough time. (Exhibit "A"). Plaintiff does not have a valid
 6 basis to argue that they were not meaningfully heard by defense counsel prior to the motion being
 7 filed. The only requirement is to inquire about whether there remains a dispute between the
 8 parties and it was obvious that there was as Plaintiff did not (and practically could not given the
 9 stakes and cost) merely stipulate to withdraw its expert. Plaintiff's due process rights to be
 10 meaningfully heard by a neutral arbiter is satisfied when the motion is heard by the Court. The
 11 meet and confer requirement does not mean that there must be a dress rehearsal argument
 12 between counsel about their respective positions before the dispute becomes ripe for judicial
 13 intervention. The phone conference held by the parties sufficed to know that there was a wide
 14 difference of opinion about the admissibility of the expert and defense counsel's allowance to
 15 give Plaintiff the entire motion and extra time to oppose was collegial and served to amplify the
 16 meet and confer process.

17 Plaintiff's disparaging comments concerning bad faith practice and even directly calling
 18 defense counsel a liar are out of harmony with the standards of civil and courteous practice
 19 before this Honorable Court. Beyond uncivil, the allegations are demonstrably false. Plaintiff's
 20 sanction-seeking offensive pertaining to the meet and confer process is devoid of factual and
 21 legal support and should be both denied and denounced.

22 C. **The Motion to Strike Plaintiff's Expert Does Not Expand the Clark County**
 23 **Defendants' Arguments to Obtain or Resist Summary Judgment.**

24 The Clark County Defendants have addressed Plaintiff's characterization of the motion to
 25 strike the expert as just a sur-reply to rehash previously made arguments or raise new ones has
 26 been substantively addressed in the opposition to Plaintiff's motion to strike. Plaintiff elects to
 27 not engage in specific arguments comparing the content of the previously filed briefs and instead
 28 relies on the strategy of truth by assertion. The point by point arguments are reiterated here as a

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1 solid defense to Plaintiff's sanctions request. Beyond that, it needs be said that Plaintiff's sur-
 2 reply characterization rests on a vain view of the content of Plaintiff's summary judgment motion
 3 and its reply to the opposition. The Clark County Defendants have only sought to have the Court
 4 scrutinize Plaintiff's expert's methodology and opinions and requested that the report be struck
 5 for falling short of Rule 702 standards. They have not and need not use the arguments that
 6 Plaintiff's expert's legal conclusions are amiss given Ninth Circuit law to bolster their motion for
 7 summary judgment or the opposition to Plaintiff's motion.

8 Plaintiff's assertion that the motion to strike is just a response to the reply Plaintiff filed
 9 in support of its own motion for summary judgment is belied when one examines the content of
 10 the two documents. Beyond taking the position that the expert report itself is not proper evidence
 11 at trial, Rule 56 evidence or admissible evidence for any purpose in this case, there is simply no
 12 credence to Plaintiff's characterization of the motion as a sur-reply. Plaintiff's motion is not well
 13 taken and should be denied to permit the Court to undertake its gatekeeping role as to the
 14 admissibility of Plaintiff's expert's legal opinions.

15 The Clark County Defendants asserted a timely objection to the admissibility of the
 16 expert opinions with a motion to strike. The motion was filed twenty-one (21) days after
 17 Plaintiff's reply was filed including the aforementioned statement. The motion to strike
 18 (ostensibly a motion in limine) was also submitted before the District Court Judge undertook any
 19 consideration of the summary judgment briefs and even before the motion in limine deadline was
 20 even set per local rules and the Court's scheduling practices. The filing of the motion to strike
 21 (including specific points and authorities) further forecloses any waiver of objection argument
 22 that could be made by Plaintiff for purposes of deciding the pending motions or for purposes of
 23 trial.² The detailed admissibility objections based upon well-established Federal Rule of 702

24
 25 ² Defects in evidence submitted in motions or oppositions to summary judgment are not waived
 26 when the opposing party files a "motion to strike or other objection." Scharf v. United States
 27 Attorney General, 597 F.2d 1240, 1243 (9th Cir.1979); see also Fireguard Sprinkler Sys., Inc. v.
 28 Scottsdale Ins. Co., 864 F.2d 648, 651-52 & n. 2 (9th Cir. 1988)("We have held that '[i]f a
 party fails to move to strike an affidavit that is allegedly defective under Rule 56(e), he waives
 any objection to it."). Any such alleged waiver, additionally, only applies to whether the
 objection will be waived with respect to the subject motion practice, not to whether it will be

standards has been preserved by the Clark County Defendants and is now properly considered prior to adjudication of the briefed motions and well prior to the parties submitting a joint pretrial order, if necessary.

In sum, Plaintiff has failed to present any reasoned basis to be awarded sanctions for having to defend on the merits the Clark County Defendants' motion challenging the admissibility of the Flummerfelt report and his included opinions. Plaintiff has made an improper use of Rule 11--apparently believing hard-ball litigation tactics of an aggressive offense shores up a fragile defense), The unnecessarily expended time and effort in this case has actually been having shouldered by Defendants in having to oppose the two counter-motions instead of simply focusing on the legal issues entailed in the Rule 702 challenge to Plaintiff's expert report. Plaintiff's Rule 11 motion does not measure up to Rule 11 standards.

III. CONCLUSION

IN ACCORDANCE WITH THE FOREGOING, the Clark County Defendants respectfully submit that the Court should deny out of hand Plaintiff's motion [#55] for sanctions.

RESPECTFULLY SUBMITTED this 24th day of July, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

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waived at trial. In other words, failure to object to evidence presented in connection with a summary judgment motion (which has not occurred here) still does not waive any objection to that evidence at trial. See Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 118 (2d Cir.2004) (noting in connection with an appeal from an order granting summary judgment that on remand "at trial, plaintiffs are free to reiterate their objections to [the district court's evidentiary] rulings").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of July, 2020, I served the above
OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS through the CM/ECF
system of the United States District Court for the District of Nevada (or, if necessary, by U.S.
Mail, first class, postage pre-paid), upon the following:

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